

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED
July 17, 2012

No. 11-50892
Summary Calendar

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

JOSE GUADALUPE PEDRIZCO GUTIERREZ, also known as Miguel Rendon
Pedrizco,

Defendant – Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:11-CR-128-1

Before DAVIS, DeMOSS, and HAYNES, Circuit Judges.

PER CURIAM:*

Jose Guadalupe Pedrizco Gutierrez appeals the sentence imposed following his guilty plea conviction for possession with intent to distribute at least 500 grams of methamphetamine. He argues that his trial counsel was ineffective in that he failed to present mitigating evidence and seek a lesser sentence on the following grounds: (1) he met the safety valve requirements; (2) he was willing to stipulate that he was deportable; and (3) the district court

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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had discretion to impose a sentence below the advisory guidelines range under *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Spears v. United States*, 555 U.S. 261 (2009).

“[T]he general rule in this circuit is that a claim for ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court since no opportunity existed to develop the record on the merits of the allegations.” *United States v. Cantwell*, 470 F.3d 1087, 1091 (5th Cir. 2006) (internal quotation marks and citation omitted). Because we conclude that “we cannot fairly evaluate the claim from the record,” we decline to consider Pedrizco Gutierrez’s ineffective assistance of counsel claim on appeal without prejudice to his right to raise his claim in a timely 28 U.S.C. § 2255 proceeding. *See United States v. Gulley*, 526 F.3d 809, 821 (5th Cir. 2008).

AFFIRMED.